No. 87-854

Supreme Court, U.S.
FILED
NOV 24 1987
JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JERRY COLANESE, *et al.*,

Petitioners,

v.

NEW PRAIRIE CLASSROOM TEACHERS ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA

DAVID T. BRYANT
Counsel of Record
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510
Attorney for Petitioners

Of Counsel:
REX H. REED
National Right to Work Legal
Defense Foundation, Inc.

ARTHUR L. ROULE, JR.
RAELSON, OSBORN, ROULE,
BAUGHER & HEDGE
500 First National Bank Building
801 Lincoln Way, Suite 500
P. O. Box 1161
La Porte, Indiana 46350
(219) 362-3181

November 24, 1987

QUESTIONS PRESENTED FOR REVIEW

WHEN A UNION SUES A DISSENTING NONMEMBER TO COLLECT AN UNPAID REPRESENTATION FEE:

I. IS THE MEASURE OF DAMAGES REQUIRED BY THE FIRST AMENDMENT:

   A. A Pro Rata Share Of The Proven Costs Of Collective Bargaining; Or

   B. Arbitrarily Set Union Dues Less A Union-Determined Rebate Amount?

II. DOES THE FIRST AMENDMENT PERMIT A COURT TO ENTER JUDGMENT FOR AFFILIATION FEES IN A SUIT TO COLLECT THE REPRESENTATION FEE WHEN THE UNION HAS PRESENTED NO EVIDENCE OF ACTUAL EXPENDITURES FOR SERVICES PROVIDED TO THE DISSENTERS' BARGAINING UNIT BY THE STATE AND NATIONAL AFFILIATES?

LIST OF PARTIES

In addition to the parties named in the caption the following individuals are petitioners: Carol Colborne, Ronald Colborne, Christine Cortier, David Feikes, Dimitri Gloss, William Haselton, Rebecca Higgins, Michael Jennings, Donald Kane, Donald Kauffman, Janis Kiff, Patricia Lynch, William Lynch, Sandra Martz, David Mathews, Randall McCammack, Randall McGriff, David Millar, Brenda Moffitt, Timothy Moffitt, Jeffrey Neumann, Janet Wilson, Kathy Nova, Michael Powers, Ardeth Ross, Barbara Sandberg, Gail Schroeder, Daniel Shead, William Spier, Richard Sprague, Susan Stewart, Donald Thomas, Sandra Thomas, Yvonne Tofthagon, Harry Tolmen, Patricia Tolmen, Floyd Trosper, Deborah Varga, Theresa Wallace, David Washburn, and Kathryn Washburn.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA

REFERENCE TO RULINGS

The decision of the Indiana Court of Appeals is not reported. It is reproduced in the Appendix at page 1a. The decision of the Superior Court is not reported and it is included in the Appendix at page 5a. The order of the Indiana Court of Appeals denying rehearing is not reported and is included in the Appendix at page 9a. The order of the Supreme Court of Indiana denying the petition to transfer the cause to that court is not reported. It is included in the Appendix at page 10a.

JURISDICTION

The judgment of the Indiana Court of Appeals is dated January 26, 1987. Appendix, page 1a. Petitioners' petition for rehearing was denied by that court on March

30, 1987. Appendix, page 9a. Their timely petition to transfer the cause to the Supreme Court of Indiana was denied by that court on August 26, 1987. Appendix, page 10a. This petition will be filed within 90 days of that date.

This Court has jurisdiction by virtue of 28 U.S.C. § 1257(3). Because the Supreme Court of Indiana denied the petitioners' motion to transfer the cause to that court, the Court of Appeals is the highest court of Indiana in which a decision could be had. *See Abood v. Detroit Board of Education*, 431 U.S. 209, 216 (1977). Jurisdiction lies under 28 U.S.C. § 1257(3) "where any title, right, privilege or immunity is specially set up or claimed under the Constitution." As shown below, petitioners' defenses throughout the Indiana proceedings were based on their rights, privileges and immunities under the Constitution of the United States. Therefore, this Court has jurisdiction to review the judgment below by writ of certiorari. *See, e.g., New York Times Co. v. Sullivan*, 378 U.S. 540 (1964).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Respondent, New Prairie Classroom Teachers Association (NPCTA), is the exclusive bargaining agent for the teachers, including the petitioners, employed by the Board of School Trustees of the New Prairie United School Corporation (Corporation). Labor-management relations between NPCTA and the Corporation are governed by the terms of Indiana's Certified Educational Employees Bargaining Act (CEEBA), I.C. 20-7.5-1-1, *et seq*. NPCTA and the Corporation negotiated a collective bargaining agreement which went into effect on July 1, 1980. It remained in effect for school years 1981-82 and 1982-83.

Article IV, sub-paragraph 4.6, of the Agreement provides that all members of the bargaining unit who are not also members of the Association have an obligation to pay a representation fee to the Association for services rendered to all teachers. The Agreement also provides that no member of the bargaining unit will be forced to contribute financial support to political or ideological activities of the Association unrelated to collective bargaining, contract administration, and grievance adjustment or unrelated to its duties as exclusive bargaining representative.

The petitioners are not members of the NPCTA and they refused to pay any fee to it. Prior litigation with respect to the fees for 1980-81 resulted in a judgment for NPCTA for the exact amount claimed. *New Prairie Classroom Teachers Association v. Stewart*, 487 N.E.2d 1324 (Ind. App. 1986). This Court denied certiorari. *Stewart v. New Prairie Classroom Teachers Association*, ____ U.S. ____, 107 S. Ct. 1370 (1987).

The current case is a collection suit for representation fees for school years 1981-82 and 1982-83. The complaint was filed on August 17, 1983 and sought fees of $207.60 for 1981-82 and $225.80 for 1982-83. The petitioners duly answered. In their answer the petitioners denied liability and objected to the use of their fees for political and ideological purposes.

Trial was held before the court without a jury on July 31 and August 1, 1985. During the trial, in their post-trial briefs, and in their motion to correct errors to the Superior Court, the petitioners claimed that any judgment for an agency-shop fee in excess of $11.55 for 1981-82 and $19.09 for 1982-83 per individual was unconstitutional because it would be in excess of a pro rata share of the NPCTA's proven costs of representation. In this petition the teachers are attacking only the method by which the fee for NPCTA was calculated.

The record evidence with respect to the activities of NPCTA showed that its total expenditures for 1981-82, other than dues payments to affiliate organizations, divided by the number of people in the unit, were less than the dues-minus-rebate amount awarded by the trial court. Because the judgment is in excess of a pro rata share of the expenses, the constitutional violation resulting from the judgment below is evident. Appendix, page 7a.

NPCTA is affiliated with the Indiana State Teachers Association (ISTA), a statewide organization, and the National Education Association (NEA), a nationwide organization. Members of local affiliates must also be members of the state and national organizations. There-

fore, within Indiana, ISTA membership and NEA membership are the same. The fees claimed for ISTA and NEA were calculated in the same dues-less-rebate fashion as were the fees for NPCTA. During both years approximately 25% of the teachers represented by local organizations were not required to, and did not, pay fees to any level of the organization. Although these people were represented by and received the same services from ISTA and NEA as did the petitioners, their presence was ignored by the organizations in their calculations of the claimed fee. Rather than calculating the fee by dividing costs by the number of people receiving the services, the only proof offered was a dues-less-rebate calculation. When, as here, there is a significant variation between the number of people represented and the number of people required to pay the costs of such representation, a dues-less-rebate calculation always results in an excessive and therefore unconstitutional fee. The magnitude of the injury is related to the variance between the number represented and the number paying.

For example, in a true agency shop situation where *all* members and nonmembers are required to pay a fee and income equals expenses, a dues-less-rebate calculation and a pro rata share calculation will produce the same figure. In a case like this where 25% of the total are not required to pay, a constitutional pro rata share is related to dues-less-rebate in the following fashion. If "x" is a pro rata share and "y" is dues-less-rebate and there are 100 employees in the unit, only 75 of whom are required to pay fees, then

$$75\,y = 100\,x$$

$$y = \frac{100\,x}{75}$$

$$y = 1.33\,x$$

The dues-less-rebate calculation results in a fee that is excessive by 33%. The injury lessens as the number paying approaches the number represented but, as long as there is any disparity, there is injury in the constitutional sense.

The petitioners argued below that the proof was inadequate to justify any fee for ISTA and NEA because no attempt was made to show the cost of services rendered to, or on behalf of, NPCTA. The trial court awarded dues-less-rebate-based fees of $126.15 and $139.20 for ISTA and $38.40 and $42.93 for NEA. Appendix page 7a. Judgment was rendered on October 10, 1985.

As stated in the motion to correct errors filed in the Superior Court:

> The Court erred in finding that a representation fee may be based on dues *less* political, ideological, organizing and certain legal expenses. The proper measure of a representation fee is a pro rata share of the exclusive representative's costs of collective bargaining, contract administration and grievance adjustment and the performance of other statutory duties *vis-a-vis* the employer, not other government entities. If other organizations assist NPCTA to perform its statutory duties, the costs incurred may be recovered as a part of the fee but such costs are not measured by the dues paid to such organizations by members thereof. The recoverable amount is the amount actually spent in assisting the local representative in performing its duties. Amounts spent in assisting exclusive representatives other than NPCTA are not expenses recoverable from these defendants.

* * * *

In a suit-for-representation-fee case the measure of damages is not the amount of dues paid by a member; rather it is a pro rata share of the expenses incurred by the exclusive representative in performing its statutory duties. By finding that NPCTA is entitled to $19.86 as its portion of the representation fee for 1981-82 the Court ignored uncontradicted evidence that the maximum permissible pro rata fee based upon NPCTA's expenditures for the year is $18.27 per defendant.

* * * *

By finding that ISTA and NEA are entitled to fees of $126.15, $139.20 and $38.40, $42.93 respectively for the years in question the Court failed to require the plaintiff to prove the amount those organizations spent in assisting NPCTA in performing its statutory duties as the exclusive representative in the New Prairie schools. It is unlawful to charge the defendants with expenses incurred in lobbying any governmental agency other than the employer—here the Board of Trustees of the New Prairie School Corporation. The evidence in the record clearly shows that most of the activities of ISTA and NEA involve interaction with state and federal agencies other than the employer of the defendants. The costs of such activities are not chargeable to the defendants. See the attached opinion in *Beck v. Communications Workers of America*, ____ F.2d ____ (4th Cir. 1985) (No. 83-1955) (October 24, 1985).

* * * *

The Court's Conclusions of Law are erroneous in that any agreement which purports to authorize a representation fee in excess of a *pro rata* share of

> the plaintiff's costs necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of employees in dealing with the New Prairie School Corporation on labor-management issues is unconstitutional. The preponderance of the evidence in this record establishes that the NPCTA is not entitled to a fee in excess of $11.55 for 1981-82 and $19.09 for 1982-83 from each defendant.

In their arguments to the Superior Court the petitioners cited and relied on this Court's agency fee cases, including: *Ellis v. Railway Clerks*, 466 U.S. 435 (1984); *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Railway Clerks v. Allen*, 373 U.S. 113 (1963); *Machinists v. Street*, 367 U.S. 740 (1960); and *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956). They also cited and relied on the Seventh Circuit's decision in *Hudson v. Chicago Teachers Union*, 743 F.2d 1187 (7th Cir. 1984), *cert. granted*, _____ U.S. _____, 105 S. Ct. 2700. In terms of dollars the petitioners argue here that the maximum permissible fees are $18.27 and $19.09. The trial court entered a judgment against each individual in the amounts of $184.40 and $201.22. In their motion to correct errors the petitioners also cited and relied on the Fourth Circuit's decision in *Beck v. Communications Workers of America*, 766 F.2d 1187, (4th Cir. 1985) (No. 83-1955) (October 24, 1985). The motion was denied. The petitioners appealed.

In the Court of Appeals the petitioners made the same arguments and relied on the same cases as they had in the trial court. In addition they relied on this Court's then recent decision in *Chicago Teachers Union v. Hudson*, 475 U.S. _____, 106 S. Ct. 1066 (1986). The constitutional argument presented was phrased as follows:

> The judgment is unconstitutional because the amount exceeds a pro rata share of plaintiffs' costs necessarily or reasonably incurred for the purpose of performing the duties of the exclusive representative of the defendants in dealing with the New Prairie United School Corporation on labor-management issues.

The Court of Appeals rejected this argument, holding that "[t]he trial court's calculation of damages was proper." Appendix, page 2a. The Court of Appeals affirmed the judgment of the trial court on January 26, 1987.

The teachers' required petition for rehearing was filed in the Court of Appeals on or before February 25, 1987. The petition for rehearing was denied on March 30, 1987. Appendix, page 9a.

On April 16, 1987, petitioners filed a petition to transfer the cause to the Supreme Court of Indiana for review. In their supporting brief they made the same arguments that had been made in the Court of Appeals. In their brief they argued that *Hudson* and the other agency fee decisions of this Court required review and reversal of the decision. On August 14, 1987, the petitioners filed with the Indiana Supreme Court a copy of the Sixth Circuit's opinion in *Tierney v. City of Toledo*, 824 F.2d 1497 (1987). Nevertheless, the petition for transfer was denied on August 26, 1987. Appendix, page 10a. Thus, the Court of Appeals is the highest court of Indiana in which a decision could be had in this case and 28 U.S.C. § 1257(3) gives this Court jurisdiction to review that decision.

REASONS FOR ALLOWING THE WRIT

I. THE DECISION OF THE INDIANA COURT OF APPEALS IS IN CONFLICT WITH THE

APPLICABLE DECISIONS OF THIS COURT AND THE DECISIONS OF OTHER STATE AND FEDERAL COURTS.

A. *The Method Of Calculation.*

Abood, *Ellis* and *Hudson* mandate that an agency shop fee be based on the exclusive representative's costs of providing required services to the bargaining unit.

> The same important government interests recognized in the *Hanson* and *Street* cases presumptively support the impingement upon associational freedom created by the agency shop here at issue. Thus, insofar as the service charge is used to finance expenditures by the Union for the purposes of collective bargaining, contract administration, and grievance adjustment, those two decisions of this Court appear to require validation of the agency-shop agreement before us.

Abood, 431 U.S. at 225-26. In *Abood* the Court went on to approve the concept of agency shops for public employees. In doing so, the Court pointed out that there will "be difficult problems in drawing lines between collective bargaining activities for which contributions may be compelled, and ideological activities unrelated to collective bargaining, for which such compulsion is prohibited." *Id.* at 236. The Court also pointed out that the remedy must prevent "compulsory subsidization of ideological activity" while at the same time permitting the Union "to require every employee to contribute to the cost of collective bargaining activities." *Id.* at 237. It is *costs*, not dues, for which contributions can be compelled.

Ellis involved an agency shop for private sector employees, but the test of chargeability formulated there-

in is a constitutional one. 466 U.S. at 455. *Ellis* is a line-drawing case decided under the Railway Labor Act. There, the Court explained that the justification for union or agency shops is to eliminate the free-rider—the employee whom the union is required to represent but who has refused to contribute to the cost of such representation. With respect to such contributions the Court said:

> Hence, when employees such as petitioners object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

Id. at 448. Again, it is *costs*, not dues, for which contributions can be compelled.

Hudson concerned the procedural protections which must be in place before compelled contributions may be involuntarily deducted from a dissenting nonmember's salary. Nevertheless, it is precedent with regard to the questions presented here, because it requires that information with respect to expenditures be furnished to nonmembers, and disapproves of a fee calculated on a percentage of dues basis. Also, *Hudson* makes clear that

a fee may be compelled to collect for collective bargaining costs, not other expenses.

> Instead of identifying the expenditures for collective bargaining and contract administration that had been provided for the benefit of nonmembers as well as members—and for which nonmembers as well as members can fairly be charged a fee—the Union identified the amount that it admittedly had expended for purposes that did not benefit dissenting nonmembers. An acknowledgment that nonmembers would not be required to pay any part of 5% of the Union's total annual expenditures was not an adequate disclosure of the reasons why they were required to pay their share of 95%.[18]

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18. We continue to recognize that there are practical reasons why "[a]bsolute precision" in the calculation of the charge to nonmembers cannot be "expected or required." *Allen*, 373 U.S., at 122, 83 S.Ct., at 1163-1164, quoted in *Abood*, 431 U.S., at 239-240, n.40, 97 S.Ct., at 1801-1802 n.40. Thus, for instance, the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year. The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor. With respect to an item such as the Union's payment of $2,167,000 to its affiliated state and national labor organizations, see n.4, *supra*, for instance, either a showing that none of it was used to subsidize activities for which nonmembers may not be charged, or an explanation of the share that was so used was surely required.

Id. at 1076.

The Indiana Court of Appeals was aware of *Hanson*, *Street*, *Allen*, *Abood*, *Ellis* and *Hudson* when it made its decision, yet it determined that the dues paid by a member was the proper measure of damages in this case. The disparity between the number of people represented and the number of people paying fees establishes the error in this conclusion. The First Amendment violation is clear, as is the failure of the Indiana Court of Appeals to properly interpret and apply *Abood*, *Ellis* and *Hudson*.

The Indiana Court of Appeals' reasoning flies in the face of this Court's statement in *Ellis* that the Court's comments about remedy in *Street* and *Allen* "did not, nor did they purport to, pass upon the statutory or constitutional adequacy of the suggested remedies. Doing so now, we hold that the pure rebate approach is inadequate." *Ellis*, 466 U.S. at 443. The Court of Appeals' reasoning also is contrary to the holding in *Ellis*, 466 U.S. at 457 n.15 (emphasis added), "that the union bears the burden of what proportion of *expenditures* went to activities *that could be charged* to dissenters" by "the preponderance standard normally applicable in civil suits for damages."

Moreover, the result reached is inconsistent with *Hudson*, because the Indiana court accepted the union's dues-less-rebate approach. *Hudson* specifically rejected proof of that nature as satisfying the notice required for First Amendment procedural due process:

> An acknowledgment that nonmembers would not be required to pay any part of 5% of the Union's total

> annual expenditures was not an adequate disclosure of the reasons why they were required to pay their share of 95%.

Hudson, 106 S. Ct. at 1076. The First Amendment requires that the union identify "the expenditures for collective bargaining and contract administration * * * for which nonmembers as well as members can fairly be charged a fee." *Id.* Surely a union that sues to collect a representation fee must show *no less* at trial before a court can enter a judgment depriving employees of their property. *See Hudson*, 106 S. Ct. at 1074 n.13; *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973); *Speiser v. Randall*, 357 U.S. 513, 524-25 (1958).

The reasoning of the Indiana Court of Appeals is also contrary to the elementary logic applied by the Massachusetts Labor Relations Commission in similar cases. *See, e.g., Dailey v. Woburn Teachers Association*, 13 MLC 1555 (1987). The Massachusetts Commission insists, and properly so, that to carry its burden of proof a union must not only prove the expenses of collective bargaining but also it must prove the number of people in the unit being served so that a proper pro rata share may be determined by dividing the one by the other. Dues, as such, have nothing to do with the calculation. The MLRC reasoned as follows:

> Here, we must consider whether the WTA has sustained its burden of establishing that the $141 agency fee it charged Dailey, minus the $10.71 "rebatable amount" that the WTA concedes was not chargeable to Dailey, was Dailey's proportional share of the permissible expenditures of the WTA and its affiliates. The WTA's position is that the agency fee

minus the "rebatable amount" for 1981-82 accurately reflects Dailey's pro rata share of permissible expenditures. WTA Exhibits 6 and 9 reveal, that, in 1981-82, the MTA and NEA calculated the "rebatable amounts" by adding all of the expenditures that the organizations themselves designated as impermissible, calculating what percent of total expenditures was impermissible, and applying that percentage to $141, the total amount of 1981-82 membership dues. The result was $6.29 of MTA expenditures, and $4.42 of NEA expenditures. The balance, according to the WTA, represents Dailey's pro rata share of the legitimate costs of collective bargaining.

Dailey raises a host of objections to this procedure. For the purposes of this motion, we need address only one, because it is dispositive. Dailey argues that, even if the WTA and its affiliates had accurately identified all of their impermissible expenditures, the WTA's method of calculating Dailey's share would nonetheless fail to comply with the constitutional mandate because there is no evidence of how members' dues are calculated and what relation they bear to total expenditures. "Applying a carefully calculated percentage to an arbitrary number does not provide any meaningful result." Dailey's Brief on Motion for Judgment at 7.

We agree with Dailey's position. Under Section 12 of the Law, public employees "may be forced to pay their proportional share of collective bargaining, contract administration, and grievance adjustment expenses." *School Committee of Greenfield*, 385 Mass. at 78. We hold, however, that the amount of the proportional share can be determined by: (1) adding up all of the amounts that a union has spent permissibly and dividing the total by the number of employees

> represented; or (2) evidence that the membership dues for a particular year represented the members' pro rata share of the anticipated union expenses for that year and that a particular proportion of those expenses were permissible. Thus, assuming, without deciding, that all of the WTA's expenditures in 1981-82 were permissible, the WTA could divide $87,046.40 (the amount of total expenditures shown in WTA Exhibit 1) by the number of employees in the WTA bargaining unit to determine the agency fee. Similarly, the MTA could divide its total permissible expenditures by the number of employees represented by the MTA to determine the portion of the agency fee payable to the MTA.

Dailey, at 1563-64 (footnotes omitted). As indicated above, the Massachusetts rule flows from *School Committee of Greenfield v. Greenfield Education Association*, 385 Mass. 70, 431 N.E.2d 180 (1982), which in turn follows this Court's opinion in *Abood*.

It is clear that the rule in Massachusetts conflicts with the rule in Indiana. It is also clear that the Indiana rule conflicts with the controlling decisions of this Court.

By limiting its consideration of injury solely to the post-collection use of fees, the Indiana Court of Appeals utterly failed to protect or provide for the other important pre-collection First Amendment rights as outlined by this Court in *Hudson*.

B. *The Evidence Is Inadequate To Show That ISTA And NEA Are Entitled To Any Fee.*

If other organizations assist NPCTA to perform its statutory duties, the costs incurred may be recovered as a part of the fee but such costs are not measured by the

dues paid to such organizations by members thereof. The recoverable amount is the amount actually spent in assisting the local representative in performing its duties. Amounts spent in assisting exclusive representatives other than NPCTA are not expenses recoverable from these teachers.

The information provided at trial on behalf of ISTA and NEA is precisely of the same type determined by this Court to be inadequate in *Hudson*, 106 S. Ct. at 1076:

> Instead of identifying the expenditures for collective bargaining and contract administration that had been provided for the benefit of nonmembers as well as members—and for which nonmembers as well as members can fairly be charged a fee—the Union identified the amount that it admittedly had expended for purposes that did not benefit dissenting nonmembers.

The result reached by the Indiana courts thus is squarely in conflict with the result reached by the Sixth Circuit in *Tierney v. City of Toledo*, *supra*. As stated in *Tierney*, the required ". . . disclosure must include an audited, detailed accounting of local union payments to affiliated state and national labor organizations that will be used for agreement and non-agreement related purposes." *Id.*, 824 F.2d at 1503; *see Hudson*, 106 S. Ct. at 1076 n.18. Necessarily, at least the same quality of information must be supplied to satisfy the union's burden of proof at trial in a collection suit.

In this connection it must be remembered that it is the employees' First Amendment rights that are involved. Any state-authorized encroachment upon those rights

must be narrowly drawn so as to be the least restrictive alternative accomplishing the governmental purpose involved. That purpose is met by requiring payment for the Union's performance of its statutory duties "in dealing with the employer on labor-management issues." *Ellis*, 466 U.S. at 448.

By finding that ISTA and NEA are entitled to fees based on their membership dues-less-rebate determination, the Indiana Court of Appeals failed to require the plaintiff to prove the amount those organizations spent in assisting NPCTA in performing its statutory duties as the exclusive representative in the New Prairie schools. The teachers contend that the vast majority of NEA's and ISTA's activities, political or otherwise, are not "related to collective bargaining" with the Corporation as this Court understood that concept in *Abood*. The plurality opinion in *Abood* held that, although collective bargaining in public-sector employment is itself a "political" activity, a state statute could require dissenting employees (such as the teachers here) to associate with an exclusive representative (such as NPCTA) for the purpose of bargaining.

And it went on to hold that certain other "political" activities "might be seen as an integral part of the bargaining process." 431 U.S. at 227-32, 236 (opinion of Stewart, J.).

The definition of "collective bargaining" used in *Abood*, though, was quite precise. The Michigan statute at issue itself defined "collective bargaining" as

> the performance of the mutual obligation of the employer and the representative of the employees to

> meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract, ordinance or resolution incorporating any agreement if requested by either party.

Mich. Comp. Laws § 423.215. And the *Abood* plurality reflected just such an understanding of collective bargaining—but no more. For example, the plurality referred to "[t]he tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances"; by way of examples, it spoke of "the union's policy in negotiating a medical benefits plan," "a union policy of negotiating limits on the right to strike," "the union's wage policy," and "the union's seeking a clause in the collective-bargaining agreement proscribing racial discrimination"; it wrote of "expenditures" and "service charges * * * applied to collective bargaining, contract administration, and grievance-adjustment purposes"; and it distinguished from "collective-bargaining activities" those "social activities" that "fall outside the Union's duties as exclusive representative." 431 U.S. at 221, 225-26, 232, 236 n.33. Recognizing that successful "negotiating [of] a final agreement" might require "the approval of a higher executive authority or a legislative body," the plurality added that "subsequent approval [of a written collective-bargaining agreement] by other public authorities" and "related budgetary and appropriations decisions might be seen as an integral part of the bargaining process." *Id.* at 228, 236. Overall, then, the *Abood* plurality held that "collective bargaining" means:(i) negotiating an agreement with the public employer; (ii) where necessary,

seeking the "approval of a higher executive or legislative body" to ratify or implement the agreement; and (iii) administering the agreement—in short, performing the statutory duties of the exclusive representative.

Moreover, *Abood* makes clear that, with respect to a particular organization acting as an exclusive representative of particular public employees, "collective bargaining" refers only to those activities that the representative performs, pursuant to the applicable statute, *within the bargaining unit to which the employees belong*. The policy reasons that arguably justify compelling dissenting public employees to associate with a private organization as their exclusive representative rationally apply only to the unit in which those employees function—for only there does the representative have "great responsibilities" *relative to those employees*; only there may the representative's task "entail expenditures of much time and money," or even any time and money, ostensibly *on behalf of those employees*; only there will *those employees* possibly have "the incentive * * * to become 'free riders'"; only there is the representative "under a duty of fair representation" *to those employees*; only there will "confusion and conflict" *as to those employees' terms and conditions of employment* arguably be mitigated by collective negotiations; and only there will "labor peace" among those employees be served (if at all) by collective bargaining. *Id.* at 221, 222, 224; *see Hammons v. Adams*, 783 F.2d 597, 604-05 (5th Cir. 1986); *Sine v. Local 992, IBT*, 730 F.2d 964, 966 (4th Cir. 1984).

Or, in sum, "collective bargaining" under *Abood* means negotiation and administration of an agreement concerning terms and conditions of employment for

employees in the bargaining unit under consideration, and (where applicable) "political" activity that is "an integral part of the bargaining process" because it is necessary to ratify or implement the negotiated agreement. "Collective bargaining" for employees in unit *A*, then, does *not* include *any* activity the organization designated as their exclusive representative performs for employees in some separate units *B*, *C*, or *D*—even if that organization or one of its affiliates is also the representative in those units. Rather, with respect to the employees in unit *A*, the activities of the representative in units *B*, *C*, or *D* constitute "political activities '*unrelated* to collective bargaining'" because: (i) that other activity is "political," by definition; and (ii) it is not a part "of the bargaining process" in the relevant bargaining unit. The holdings of this Court in *Abood*, *Ellis* and *Hudson* compel these conclusions.

Thus, in *Ellis* the Court approved litigation costs for "disputes arising in the bargaining unit," "fair representation litigation arising within the unit," "any other litigation . . . that concerns bargaining unit employees and is normally conducted by the exclusive representative," but excluded "the expenses of litigation not having such a connection with the bargaining unit." 466 U.S. at 453. Moreover, the general standard for chargeable costs adopted in *Ellis* limits them to activities directly tied to the union's performance of its statutory duties as "exclusive representative of the employees in *dealing with the employer* on labor-management issues" and "as exclusive representative of the employees *in the bargaining unit*." *Id.* at 448 (emphasis added). And in *Hudson* this Court was concerned with the amounts paid by the exclusive representative to its state and national affiliates. *Hudson*, 106 S. Ct. at 1076 n.18.

By failing to require proof of the amount spent by ISTA and NEA in support of the exclusive representative, the Indiana Court of Appeals failed to follow the applicable decisions of this Court.

C. *The Issues Raised In This Case Are Of Nationwide Importance.*

As the Court well knows from its review of other cases, *e.g.*, *Abernathy v. San Jose Teachers Ass'n*, 475 U.S. _____, 106 S. Ct. 1372 (1986); *Tierney v. City of Toledo*, 475 U.S. _____, 106 S. Ct. 1628 (1986), suits for service fees are quite common. In Indiana the only way in which a union can enforce collection of a fee from a dissenter is by a civil action for damages. *See*, *Alexander v. Anderson Federation of Teachers*, 416 N.E.2d 1327 (Ind. App. 1981) (agreement making payment of an agency fee a condition of employment is illegal under Indiana law).

However, as shown by the result below, the Indiana courts are refusing to follow and apply not only the decisions of the other states and lower federal courts but also the clear precedents of this Court as well. While this Court's opinions are cited, the results reached are clearly inconsistent therewith. Petitioners submit that the current rule in Indiana is clearly unconstitutional. But, unless the current rule is changed by this Court, Indiana will remain a pocket where the delicate First Amendment rights of its teachers continue to be abused by short-sighted and insensitive jurists who have embarked on a course not guided by applicable precedents of this Court. In Indiana alone, the First Amendment rights of over 11,200 teachers are abridged until this Court reviews the judgment below and clearly enforces the already articulated proper rule

that an agency fee must be based on a pro rata share of an exclusive representative's proven costs of collective bargaining on behalf of the dissenting employees' bargaining unit.

CONCLUSION

For the foregoing reasons the Court should grant this petition and set the case down for plenary briefing and argument.

Respectfully submitted,

DAVID T. BRYANT
Counsel of Record
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510
Attorney for Petitioners

Of Counsel:
REX H. REED
National Right to Work Legal
Defense Foundation, Inc.

ARTHUR L. ROULE, JR.
RAELSON, OSBORN, ROULE,
BAUGHER & HEDGE
500 First National Bank Building
P. O. Box 1161
La Porte, Indiana 46350
(219) 362-3181

November 24, 1987

APPENDICES

APPENDIX A

DECISION OF THE COURT OF APPEALS OF INDIANA THIRD DISTRICT

January 26, 1987

IN THE
COURT OF APPEALS OF INDIANA
THIRD DISTRICT

JERRY COLANESE, ET AL.,	)	
Appellants	)	
(Defendants Below)	)	
v.	)	No. 46A03-8603-CV-72
NEW PRAIRIE CLASSROOM	)	FILED:
TEACHERS ASSOCIATION,	)	JANUARY 26, 1987
Appellee	)	
(Plaintiff Below)	)	

APPEAL FROM THE LAPORTE SUPERIOR COURT
ROOM ONE
HONORABLE DONALD D. MARTIN, JUDGE
CAUSE NO. 42843

MEMORANDUM DECISION

HOFFMAN, J.

Defendants-appellants Jerry Colanese, et al., appeal from a judgment in favor of plaintiff-appellee New Prairie Classroom Teachers Association.

New Prairie Classroom Teachers Association (hereinafter NPCTA) was, by the terms of a collective bargaining agreement with the Board of School Trustees of the New Prairie United School Corporation, the exclusive bargaining agent for the teacher of that corporation, including the appellants (hereinafter "Teachers"), for the period of July 1, 1980 through June 30, 1983. The terms of the collective bargaining agreement provided that all members of the bargaining unit who were not also members of NPCTA had an obligation to pay a representation fee to NPCTA for services rendered to all

teachers. The Teachers were not members of NPCTA and refused to pay any fee. NPCTA filed a complaint for damages on August 17, 1983 asking for the Teachers' representation fees for the school years 1981-82 and 1982-83. The Teachers answered the complaint and filed a counterclaim against NPCTA for future relief. The trial court entered judgment for plaintiff NPCTA against the defendant Teachers and ordered the Teachers to each pay the sum of $181.41 for school year 1981-82 and $201.22 for school year 1982-83.

The Teachers present two issues, as restated, for review:

(1) whether the trial court erred in its calculation of the representation fee due NPCTA; and

(2) whether the trial court erred in denying appellants' counterclaim and their request for injunctive relief.

Both of these issues have been decided contrary to Teachers in *Abels v. Monroe County Educ. Ass'n* (1986), Ind.App., 489 N.E.2d 533, 538, *reh. denied* and *New Prairie Classroom Teachers v. Stewart* (1986), Ind.App., 487 N.E.2d 1324, 1328, *trans. denied.* Those decisions thus control the outcome of the Teachers' allegation of error. The trial court's calculation of damages was proper.

The Teachers' second allegation of error challenges the following Findings of Fact by the trial court:

> 7. The Court further finds [that] defendants have failed to prove the allegations of their counterclaim and the same is accordingly denied.
>
> 8. The Court further finds that injunctive relief is inappropriate and the same is accordingly denied."

A trial court's finding of fact will not be disturbed on appeal unless it is unsupported by the evidence, and this Court will not weigh the evidence but will view only that evidence most favorable to the appellee. *Kozuch v. CraMar Video Center, Inc.* (1985), Ind. App., 478 N.E.2d 110, 113.

The Teachers' counterclaim asked for damages, pursuant to 42 U.S.C. § 1983, for alleged constitutional violations by NPCTA. The Teachers rely on the United States Supreme Court's decision in *Abood v. Detroit Bd. of Education* (1977), 431 U.S. 209, 235, 97 S.Ct. 1782, 1800, in which the Court recognized that the First Amendment of the United States Constitution prevents a union from using part of required representation fees to contribute to political candidates and/or to express political views unrelated to its duties as exclusive bargaining representative.

The Teachers' counterclaim was properly denied. No constitutionally impermissible use of service fees could have possibly occurred because no such fees have been collected to date. Also, the calculation of the as yet uncollected service/representation fees by the trial court was consistent with the method approved by this Court (see *Abels*, *supra*, and *Stewart*, *supra*) and suggested by the United States Supreme Court in *International Ass'n. of Machinists v. Street* (1961) 367 U.S. 740, 774-775, 81 S.Ct. 1784, 1802-1803. This approved method was specifically intended to prevent the constitutionally impermissible use of service/representation fees.

The trial court was also justified in finding that the injunctive relief prayed for by the Teachers was inappropriate. In their counterclaim and answer, the Teachers asked

> "that the Court issue an injunction barring Plaintiff, now and in the future, from instituting judicial

> action to collect any service fee from Defendants which Plaintiff knows does not accurately reflect a nonmember's pro rata share of the costs of collective bargaining, contract administration and grievance handling[.]"

No injunctive relief was warranted because plaintiff NPCTA did and does have the right to file claims for an amount of representation fees that is consistent with the method of calculation approved by this Court in *Abels*, *supra*, and *Stewart*, *supra*. Also, the allegations contained in the Teachers' counterclaim of inequitable conduct and bad faith on the part of NPCTA in initiating this action were totally unsupported by the record. No evidence of such conduct was presented at trial.

The decision of the trial court is affirmed.

GARRARD, P.J., and STATON, J., CONCUR.

APPENDIX B

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE LA PORTE SUPERIOR COURT NO. 1

October 10, 1985

STATE OF INDIANA	)	LAPORTE SUPERIOR
	) SS:	COURT NO. 1
COUNTY OF LAPORTE	)	1985 TERM

NEW PRAIRIE CLASSROOM TEACHERS ASSOCIATION, Plaintiff,	)	
vs.	)	CAUSE NO. 42843
JERRY COLANESE, et al., Defendants.	)	

This case came before the Court for trial on July 31, 1985 and August 1, 1985. Plaintiff appeared by counsel, Richard J. Darko, Janet C. Knapp and Patrick E. Donoghue. Defendants appeared by counsel, David T. Bryant and Arthur L. Roule, Jr. Witnesses were sworn and evidence heard. At the conclusion of the trial, the Court took the matter under advisement pending submission by the parties of written briefs and proposed findings and conclusions. The parties have submitted the same and the Court now issues its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. The Indiana Court of Appeals held in *New Prairie Classroom Teachers Association v. Stewart*, 460 N.E.2d 149 (Ind. App. 1983) that:

> "The agency shop agreement between NPCTA and the School Board as to payment of representation fees to NPCTA was authorized by law, constitutional, and binding upon non-member teachers."

2. The collective bargaining clause which was the subject of the Court of Appeals decision in *Stewart*, *supra*, is the same clause under which NPCTA seeks to collect a representation fee in this case.

3. NPCTA is the exclusive representative of the certified school employees in the New Prairie United School Corporation. NPCTA was elected exclusive representative in its affiliated status with Indiana State Teachers Association (ISTA) and National Education Association (NEA). A teacher may not join the NPCTA without also joining ISTA and NEA.

4. Defendants in this suit, non-members of NPCTA who are also members of the bargaining unit represented by NPCTA, are liable for a fair share representation fee for school years 1981-82 and 1982-83. The proper amount of the representation fee includes all costs related to collective bargaining, contract administration, grievance adjustment and the performance of the duties of an exclusive bargaining representative. The representation fee shall not include any expenses for political and ideological activities unrelated to the duties of the exclusive bargaining representative, the cost of organizing non-members and certain legal expenses not properly charged to non-members.

5. The scope of the fair share representation fee encompasses numerous statutory duties with their attendant responsibilities and activities. NPCTA's affiliation with ISTA and NEA provides necessary and vital resources without which NPCTA could not meet its legal obligations without charging exorbitant fees to both members and non-members.

6. By a preponderance of the evidence, Plaintiff has established it is entitled to recover of each of the Defendants in this suit the following:

a. For school year 1981-82, NPCTA is entitled to collect a representation fee in the amount of $184.41 per defendant. This amount includes $19.86 for NPCTA, $126.15 for ISTA, and $38.40 for NEA.

b. For school year 1982-83, NPCTA is entitled to collect $201.22 per defendant. This amount includes $19.09 for NPCTA, $139.20 for ISTA, and $42.93 for NEA.

7. The Court further finds defendants have failed to prove the allegations of their counter-claim and the same is accordingly denied.

8. The Court further finds that injunctive relief is inappropriate and the same is accordingly denied.

CONCLUSIONS OF LAW

1. The law is with Plaintiff and against the Defendants.

2. The representation fee provision between NPCTA and the New Prairie United School Corporation contained in their collective bargaining agreement is a constitutional, enforceable obligation by which the Plaintiff may collect a fair share representation fee from non-members of its bargaining unit.

3. By a preponderance of the evidence the Plaintiff has established the amount of the fair share representation fee for school year 1981-82 assessable against each Defendant to be the sum of $184.41.

4. By a preponderance of the evidence, Plaintiff has established the amount of the fair share representation fee for school year 1982-83 assessable against each Defendant to be in the sum of $201.22.

IT IS THEREFORE ORDERED, ADJUDGED & DECREED, that the Plaintiff have and recover of each of the Defendants in this suit the sum of $184.41 for school year 1981-82 and the sum of $201.22 for school year 1982-83 plus all costs of this action.

Dated this 10th
day of October, 1985.

/s/ Donald D. Martin

DONALD D. MARTIN, Judge
LaPorte Superior Court No. 1

APPENDIX C

NOTICE OF THE COURT OF APPEALS OF INDIANA DENYING PETITION FOR REHEARING

March 30, 1987

STATE OF INDIANA

CLERK OF THE SUPREME COURT,
COURT OF APPEALS AND TAX COURT

DANIEL ROCK HEISER, CLERK
217 STATE HOUSE

INDIANAPOLIS, 46204

TELEPHONE 317-232-1930

DAVID T. BRYANT
SUITE 600
8001 BRADDOCK ROAD
SPRINGFIELD, VA 22160-0000

Cause Number
46A03-8603-CV-00072
LOWER CAUSE
42843

JERRY COLANESE, ET AL VS NEW PRAIRIE CLASSROOM TEACHERS

You are hereby notified that the COURT OF APPEALS has on this day 3/30/87 APPELLANT'S PETITION FOR REHEARING DENIED. WESLEY W. RATLIFF, JR., CHIEF JUDGE.
APPELLEE'S PETITION TO PUBLISH DECISION DENIED. WESLEY W. RATLIFF, JR., CHIEF JUDGE.

WITNESS my name and the seal of said
Court, this 30TH day of MARCH, 1987

/s/ Dan Heiser
Clerk Supreme Court, Court of
Appeals and Tax Court

APPENDIX D

NOTICE OF THE SUPREME COURT OF INDIANA DENYING PETITION FOR TRANSFER

August 26, 1987

STATE OF INDIANA

CLERK OF THE SUPREME COURT,
COURT OF APPEALS AND TAX COURT

DANIEL ROCK HEISER, CLERK
217 STATE HOUSE

INDIANAPOLIS, 46204

TELEPHONE 317-232-1930

DAVID T. BRYANT
SUITE 600
8001 BRADDOCK ROAD
SPRINGFIELD, VA 22160-0000

Cause Number
46A03-8603-CV-00072
LOWER CAUSE
42843

JERRY COLANESE, ET AL VS NEW PRAIRIE CLASSROOM TEACHERS

You are hereby notified that the SUPREME COURT has on this day 8/26/87 APPELLANT'S "PETITION FOR TRANSFER" IS HEREBY DENIED. RANDALL T. SHEPARD, CHIEF JUSTICE.
ALL JUSTICES CONCUR.

WITNESS my name and the seal of said
Court, this 26TH day of AUGUST, 1987

/s/ Dan Heiser
Clerk Supreme Court, Court of
Appeals and Tax Court

(8)

Supreme Court, U.S.
FILED
MAR 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-854

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JERRY COLANESE, *et al.*,
Petitioners,

v.

NEW PRAIRIE CLASSROOM TEACHERS ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Indiana

---

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD J. DARKO
LOWE GRAY STEELE & HOFFMAN
One Indiana Square
Suite 3130
Indianapolis, Indiana 46204
(317) 635-8020

ROBERT H. CHANIN
(Counsel of Record)
BRUCE R. LERNER
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 833-9340
Attorneys for Respondent New Prairie Classroom Teachers Association

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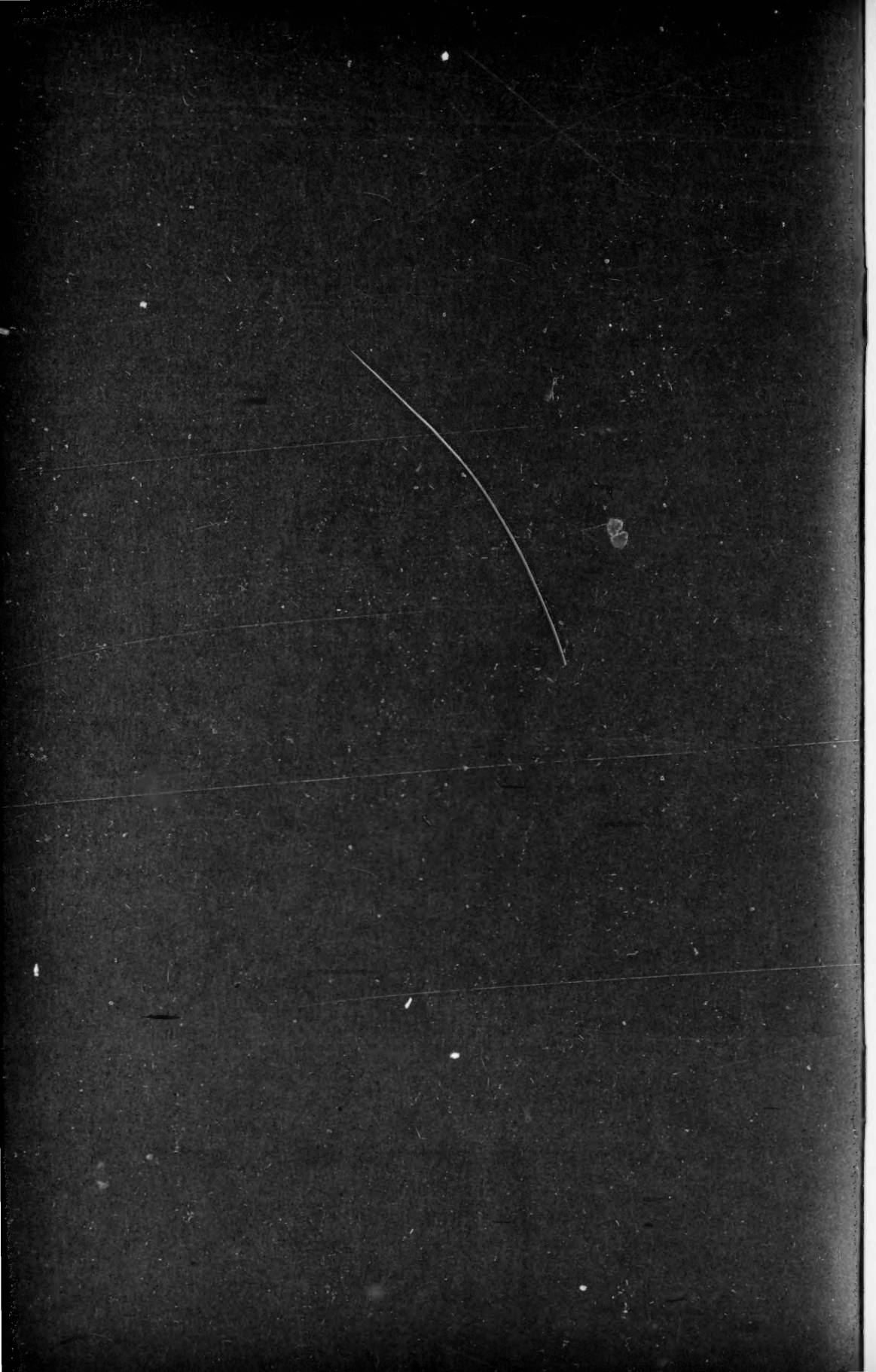
25 pp



QUESTION PRESENTED

Whether this Court should review the unpublished decision of the Court of Appeals of Indiana, which held that there was sufficient evidence in the record to justify the representation [*i.e.*, agency] fees that petitioners were ordered to pay to their exclusive collective bargaining representative, respondent New Prairie Classroom Teachers Association.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-854

JERRY COLANESE, *et al.*,
Petitioners,

v.

NEW PRAIRIE CLASSROOM TEACHERS ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Indiana

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent New Prairie Classroom Teachers Association submits that the Petition for a Writ of Certiorari should be denied, and files this brief in opposition to the Petition. At the outset, it should be noted that the Petition is in all relevant respects identical to two Petitions for Writs of Certiorari to the Indiana Court of Appeals that were denied by the Court during its 1986 Term: *Stewart v. New Prairie Classroom Teachers Association*, No. 86-554, *cert. denied*, —— U.S. ——, 107 S. Ct. 1370 (March 9, 1987), and *Abels v. Monroe County Education Association*, No. 86-603, *cert. denied*, —— U.S. ——, 107 S. Ct. 1347 (March 2, 1987). Both the questions presented for review and the supporting legal arguments in the current Petition are taken virtually verbatim from those two previous Petitions. Indeed, of the 42 individual petitioners in this case, 33 also were petitioners in No. 86-554, and the unpublished opinion of the Indiana Court of Appeals in this case merely referred back to the

opinions it issued in the two prior cases.[1] Accordingly, there is no reason for the Court to treat this Petition for a Writ of Certiorari any differently than the two Petitions that were denied last Term.

STATEMENT OF THE CASE

Since at least 1974, respondent New Prairie Classroom Teachers Association ("NPCTA") has been recognized, pursuant to Indiana's Certificated Educational Employee Bargaining Act, Ind. Code § 20-7.5-1-1 *et seq.*, as the exclusive representative for a bargaining unit consisting of the teachers employed by the New Prairie United School Corporation ("School Corporation"). Petitioners are forty-two teachers who were employed by the School Corporation during the 1981-82 and 1982-83 school years, and therefore were members of the NPCTA bargaining unit.

In its capacity as exclusive representative, NPCTA entered into a collective bargaining agreement with the School Corporation covering the period from July 1, 1980 through June 30, 1983. As permitted by Indiana law, that agreement included a representation fee provision[2]

---

[1] Indeed, the only difference between this case and the prior decision in *Stewart* is the school year at issue. Specifically, the instant case involves a challenge to representation fees charged by respondent New Prairie Classroom Teachers Association for *the 1981-82 and 1982-83 school years*; the *Stewart* case involved an identical challenge to representation fees charged by the New Prairie Classroom Teachers Association for *the 1980-81 school year*.

[2] *See New Prairie Classroom Teachers Association v. Stewart*, 460 N.E.2d 149 (Ind. App. 1983), *transfer denied* (Indiana Supreme Court, Oct. 18, 1983) ("The agency shop agreement between NPCTA and the school board as to payment of representation fees to NPCTA was authorized by law, constitutional, and binding upon non-member teachers"); *Fort Wayne Education Association, Inc. v. Goetz*, 443 N.E.2d 364 (Ind. App. 1982), *transfer dismissed* (Indiana Supreme Court, May 13, 1983).

In their Petition for a Writ of Certiorari, petitioners do not—and could not—challenge the basic constitutionality of collecting repre-

—*i.e.*, a provision that required bargaining unit employees who chose not to join NPCTA "to pay a representation fee to the Association, including the Indiana State Teachers Association and the National Education Association." Appendix to Petition ("App.") 6a (noting that clause in collective bargaining agreement was same as clause at issue in *Stewart, supra*, No. 86-554). The Indiana State Teachers Association ("ISTA") and the National Education Association ("NEA") are, respectively, NPCTA's state and national parent organizations. As part of its affiliation relationship with ISTA and NEA, NPCTA has a "unified" membership structure, which means that a teacher may not become a member of NPCTA without also joining, and paying dues to, ISTA and NEA. App. 6a. The collective bargaining agreement further provided that no feepayer "should be forced to contribute financial support to political or ideological activities of the Association unrelated to collective bargaining, contract administration, and grievance adjustment or unrelated to its duties as exclusive bargaining representative." App. 6a.

This representation fee provision was not of the classic variety. Unlike the typical arrangement—pursuant to which the fee automatically is deducted from the nonmember employee's salary, or payment is made a condition of employment for which a noncomplying employee may be terminated—NPCTA could enforce this contractual obligation only by suing to recover the amount of any unpaid fees.[3] Accordingly, when petitioners refused to pay their representation fees for the 1981-82 and 1982-83 school years, NPCTA filed this lawsuit against them in the La Porte Superior Court.

---

sentation fees from nonmember employees. *See Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

[3] The Indiana courts have held that it would violate state law to make payment of a representation fee a condition of employment enforceable by termination. *See Anderson Federation of Teachers, Local 519 v. Alexander*, 416 N.E.2d 1327 (Ind. App. 1981).

A bench trial was held on July 31 and August 1, 1985. Six witnesses testified on behalf of NPCTA. These witnesses described in detail, with appropriate documentation, the activities engaged in by NPCTA, ISTA, and NEA during the 1981-82 and 1982-83 school years; the amounts expended for each of these activities; and the specific relationship between these expenditures and the duties performed by NPCTA as the exclusive representative.[4] In addition to presenting evidence regarding the expenditures made by NPCTA, ISTA, and NEA for activities that were *included* in computing the representation fees that were sought from petitioners, NPCTA also presented evidence regarding those expenditures that it had excluded from the representation fees because it did not consider them to be sufficiently related to collective bargaining.

After reviewing the evidence presented at trial, and the briefs that were filed by the parties, the trial court issued its opinion on October 10, 1985. The court began by declaring that:

> Defendants in this suit, non-members of NPCTA who are also members of the bargaining unit represented by NPCTA, are liable for a fair share representation fee for school years 1981-82 and 1982-83. The proper amount of the representation fee includes all costs related to collective bargaining, contract administration, grievance adjustment and the performance of the duties of an exclusive bargaining

---

[4] These duties included, *inter alia*, bargaining with the School Corporation over "salary, wages, hours, and salary and wage related fringe benefits," Ind. Code § 20-7.5-1-4; engaging in discussions with the School Corporation concerning "working conditions, other than [salary, wages, hours, and fringe benefits]; curriculum development and revision; textbook selection; teaching methods; selection, assignment, or promotion of personnel; student discipline; expulsion or supervision of students; pupil-teacher ratio; class size or budget appropriations," *id.* § 20-7.5-1-5; and processing grievances against the School Corporation pursuant to the negotiated grievance arbitration provision, *id.* § 20-7.5-1-4.

> representative. The representation fee shall not include any expenses for political and ideological activities unrelated to the duties of the exclusive bargaining representative, the cost of organizing nonmembers and certain legal expenses not properly charged to non-members.
>
> The scope of the fair share representation fee encompasses numerous statutory duties with their attendant responsibilities and activities. NPCTA's affiliation with ISTA and NEA provides necessary and vital resources without which NPCTA could not meet its legal obligations without charging exorbitant fees to both members and nonmembers. App. 6a.

The court then held that each petitioner was liable to NPCTA for two representation fees, one covering the 1981-82 school year and the other covering the 1982-83 school year. Specifically, the court found:

> By a preponderance of the evidence, Plaintiff [*i.e.*, NPCTA] has established it is entitled to recover of each of the Defendants in this suit the following:
>
> a. For school year 1981-82, NPCTA is entitled to collect a representation fee in the amount of $184.41 per defendant. This amount includes $19.86 for NPCTA, $126.15 for ISTA, and $38.40 for NEA.
>
> b. For school year 1982-83, NPCTA is entitled to collect $201.22 per defendant. This amount includes $19.09 for NPCTA, $139.20 for ISTA, and $42.93 for NEA. App. 6a-7a.

Petitioners appealed these monetary judgments to the Court of Appeals of Indiana, raising several issues that were consolidated by that court into one question: whether the trial court erred in its calculation of the representation fee due NPCTA. *See* App. 2a.[5] Relying

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[5] The Court of Appeals also decided another question that was presented to that court by petitioners—namely, "whether the trial court erred in denying [petitioners'] counterclaim and their request for injunctive relief." App. 2a. On this issue, the Court of Appeals

on its prior decisions in *New Prairie Classroom Teachers Association v. Stewart*, 487 N.E.2d 1324 (Ind. App. 1986), *transfer denied* (Indiana Supreme Court, July 7, 1986), *cert. denied*, —— U.S. ——, 107 S. Ct. 1370 (1987), and *Abels v. Monroe County Education Association*, 489 N.E.2d 533 (Ind. App. 1986), *transfer denied* (Indiana Supreme Court, July 14, 1986), *cert. denied*, —— U.S. ——, 107 S. Ct. 1347 (1987), the Court of Appeals unequivocally rejected the arguments presented to that court by petitioners and answered this question in the negative. In fact, the Court of Appeals in this case expressly stated that "[t]hose decisions [*i.e.*, *Stewart* and *Abels*] control the outcome of the . . . allegation of error" that was presented in this appeal. App. 2a.

In those prior decisions, the Court of Appeals had set forth the applicable standard for determining whether expenses are chargeable to employees who refuse to join the exclusive representative by quoting at length from this Court's decision in *Ellis v. Railway Clerks*, 466 U.S. 435 (1984):

> [T]he test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

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concluded that petitioners' "counterclaim was properly denied" by the trial court, and that "[t]he trial court also was justified in finding that the injunctive relief prayed for by [petitioners] was inappropriate." App. 3a. Petitioners do not challenge either of these rulings before this Court.

Stewart, supra, 487 N.E.2d at 1328, and *Abels, supra*, 489 N.E.2d at 539 (both quoting *Ellis, supra*, 466 U.S. at 448).

Furthermore, consistent with prior decisions of this Court and the Indiana courts, the Court of Appeals in both *Stewart* and *Abels* had expressly stated that "the exclusive representative bears the burden of establishing, by a preponderance of the evidence, what proportion of their expenditures were properly assessable against non-members." *Abels, supra*, 489 N.E.2d at 539; *Stewart, supra*, 487 N.E.2d at 1329 (the exclusive representative "must prove the proportion of [its] total expenditures which were chargeable to objecting employees"). *See also Fort Wayne Education Association, Inc. v. Goetz*, 443 N.E.2d 364, 373 (Ind. App. 1982), *transfer dismissed* (Indiana Supreme Court, May 13, 1983) ("the burden [is] upon the Association to show nonpolitical use of the funds").

In each of these prior cases, moreover, the Court of Appeals applied the foregoing standards to the record previously developed in the trial court. In *Stewart*, for example, the Court of Appeals concluded that NPCTA had met its burden of proof, and that there was sufficient "evidence of probative value to support the judgment" of the trial court. *See* 487 N.E.2d at 1329. Similarly, in *Abels*, the Court of Appeals specifically rejected the argument that certain expenditures that were made by the exclusive representative and its affiliated organizations, and that were included in the representation fees, were not properly chargeable to objecting feepayers. To the contrary, the court concluded in that case that "[t]he trial court's determination of the proper fair share representation fee [was] supported by sufficient evidence contained in the record." 489 N.E.2d at 542.

Although the Court of Appeals in the instant case did not directly state that the trial court's calculation of the representation fees owed by petitioners was supported by

the record evidence developed during the two-day trial, that was clearly its intent when it relied on the prior decisions in *Stewart* and *Abels* as "control[ling] the outcome" of petitioners' claims. App. 2a. Indeed, after citing to those prior decisions, the Court of Appeals in this case expressly concluded that "[t]he trial court's calculation of damages [*i.e.*, the amount of lawfully chargeable representation fees] was proper." App. 2a.

The same is true with regard to the second issue raised by petitioners in their Petition for a Writ of Certiorari—namely, whether their representation fees should include payments to ISTA and NEA. On this issue, the Court of Appeals also cited to its prior decisions in *Stewart* and *Abels*, both of which had found sufficient evidence in the record to support a trial court judgment that certain payments to ISTA and NEA were properly chargeable to objecting feepayers. For example, in *Stewart*—which concerned representation fees payable to NPCTA for the 1980-81 school year—the Court of Appeals first observed "that NPCTA had been elected exclusive representative in its affiliated status" with ISTA and NEA, and that "the collective bargaining agreement [itself] provides . . . that the representation fee shall include payments to ISTA and NEA." 487 N.E.2d at 1327. The court then rejected the contention that ISTA and NEA "allegedly provided no collective bargaining services to the teachers during the term for which payment is being sought." *Id.* To the contrary, and on the basis of the evidence presented at trial, the court found that ISTA and NEA provided employees in the bargaining unit with numerous services that properly could be charged to objecting feepayers. As the court put it:

> [O]ne purpose of these payments [to ISTA and NEA] was to secure the availability of services from these organizations. As the United States Supreme Court has recognized,
>
> > "[t]he tasks of negotiating and administering a collective-bargaining agreement and represent-

> ing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. *See* [*Machinists v.*] *Street*, 367 U.S. [740, 760 (1961)]. The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required."

Abood v. Detroit Bd. of Education (1977), 431 U.S. 209, 221. Were NPCTA to hire local lawyers, negotiators or researchers, there would be little dispute that they could charge a fair share of the cost to the non-member teachers. Instead, they have chosen to pay a fixed, yearly amount for the continued availability of such services. The teachers cannot force NPCTA to abandon this approach, nor should they be allowed to benefit from the services of ISTA or NEA without paying a fair share of the cost of their continued availability. 487 N.E.2d at 1327.

The Court of Appeals in *Stewart* then turned to the evidence presented in the trial court to identify certain of the specific collective bargaining services that were provided by ISTA and NEA. Dealing first with a challenge to "the expenditures of ISTA and NEA for lobbying governmental agencies other than the school board," 487 N.E.2d at 1329, the court stated that it "agree[d] with [the United States Courts of Appeals for both the Third and Ninth Circuits] that lobbying efforts germane to the union's duties as an exclusive representative are chargeable to objecting employees." *Id.* (citing *Robinson v. State of New Jersey*, 741 F.2d 598 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985), and *Champion v. State of California*, 738 F.2d 1082 (9th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985)). In addition to these lobbying expenses, the court found that:

> There was evidence at trial that ISTA and NEA, through Unified Services (UniServ), provided other more direct assistance to NPCTA in performing its duties as the teachers' exclusive representative. They

> provided training and assistance in the area of collective bargaining, as well as other areas. Under [Ind. Code §] 20-7.5-1-5, NPCTA is required to discuss with the school board such topics as curriculum development and textbook selection, and UniServ provided its expertise in these areas. 487 N.E.2d at 1330.

The Court of Appeals thus concluded in *Stewart* that:

> There was sufficient evidence that the payments to ISTA and NEA were "necessarily or reasonably incurred for the purpose of performing [NPCTA's] duties [as] an exclusive representative." *Ellis, supra*, [466 U.S. at 448]. The trial court did not err in ordering the teachers to reimburse ISTA and NEA. 487 N.E.2d at 1330.[6]

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[6] The Court of Appeals in *Abels* applied a similar line of reasoning to reach a similar conclusion. Specifically, the court found that ISTA and NEA provided employees in the bargaining unit with numerous services that properly could be charged to objecting fee-payers. As the court explained:

> State and national organizations, particularly in the area of education, have traditionally supplied these and other services to assist their local affiliates in carrying out collective bargaining responsibilities. Such a network spreads the costs of acquiring these services, thus, facilitating collective bargaining activities even for the smaller bargaining units. If a local organization were required to employ its own staff of lawyers, expert negotiators, economists, and researchers, as the [petitioners'] argument necessarily suggests, the costs of collective bargaining could quickly become prohibitive. We have found no support for such a result. 489 N.E.2d at 537.

With specific regard to the services provided to the exclusive representative by ISTA and NEA, the Court of Appeals stated:

> As we noted above, these are numerous services which an exclusive representative would need to employ in order to effectively fulfill its collective bargaining responsibilities. MCEA has chosen to pay fixed yearly fees to ISTA and NEA in return for continuous availability of a wide range of services. Certainly MCEA could have determined that another method of acquiring these collective bargaining services was more advantageous. However, it did not. We perceive no basis which would

The evidence presented by NPCTA to the trial court in this case was of the same kind, and the same degree, as the evidence in the record in *Stewart*. *See supra* at 4-5. It therefore was not surprising that the Court of Appeals in this case simply relied on its prior ruling in *Stewart* (as well as its previous ruling in *Abels*) to affirm the judgment of the trial court in an unpublished opinion. App. 2a. After issuance of that opinion, moreover, the Court of Appeals denied petitioners' motion for rehearing. The Supreme Court of Indiana subsequently refused to review the decision of the Court of Appeals.

REASONS FOR DENYING THE WRIT

As already noted, *supra* at 1-2, the Petition for a Writ of Certiorari in this case is virtually identical to two Petitions that were denied by the Court only a year ago, during its 1986 Term. *See Stewart v. New Prairie Classroom Teachers Association*, No. 86-554, *cert. denied*, —— U.S. ——, 107 S. Ct. 1370 (March 9, 1987), and *Abels v. Monroe County Education Association*, No. 86-603, *cert. denied*, —— U.S. ——, 107 S. Ct. 1347 (March 2, 1987). Perhaps most important, the decision of the Court of Appeals of Indiana in this case was based entirely on the opinions issued by that court in those two prior cases. Indeed, the Court of Appeals expressly stated that "[t]hose decisions [*i.e.*, *Stewart* and *Abels*] control[led] the outcome" in this case. Accordingly, we respectfully submit that, inasmuch as the Court already

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permit non-members to force MCEA to abandon the approach it has selected as most effective, short of an election to oust MCEA as the bargaining unit's exclusive representative. Therefore, assuming that the fair share representation fees sought for ISTA and NEA are not otherwise objectionable, non-members may be required to pay them. 489 N.E.2d at 538.

The court in *Abels* then turned directly to the "challenge [to] the amount of fair share representation fee[s] destined for ISTA and NEA," concluding that the challenge was "merely an invitation to reweigh the evidence" which, the court held, "we will not do." 489 N.E.2d at 542.

has denied Petitions for Writ of Certiorari in both *Stewart* and *Abels*, there is absolutely no reason for the Court to treat this Petition any differently than the Petitions in *Stewart* and *Abels* that were denied last Term.

Nonetheless, in the interests of completeness, we offer the following response to the instant Petition. Specifically, petitioners challenge the ruling of the Court of Appeals in this case on two grounds: they claim initially that the method used by the court to calculate the amount of the representation fees was incorrect; and they claim, in addition, that the court erred when it included in the representation fee amounts to be paid to ISTA and NEA. As we shall demonstrate, petitioners' first claim is based upon a mischaracterization of the decision of the Court of Appeals, and their second claim relates to conclusions reached by that court with regard to the sufficiency of the evidence presented in the trial court. Neither of these claims presents a question that warrants further review by this Court.

I. THE CONCLUSION OF THE COURT OF APPEALS OF INDIANA THAT NPCTA HAD PRESENTED SUFFICIENT EVIDENCE OF ITS CHARGEABLE EXPENDITURES TO JUSTIFY THE REPRESENTATION FEES AWARDED BY THE TRIAL COURT DOES NOT WARRANT REVIEW BY THIS COURT

The first of the two Questions Presented in the Petition for Certiorari is as follows:

> WHEN A UNION SUES A DISSENTING NONMEMBER TO COLLECT AN UNPAID REPRESENTATION FEE:
>
> I. IS THE MEASURE OF DAMAGES REQUIRED BY THE FIRST AMENDMENT:
>
> A. A Pro Rata Share Of The Proven Costs of Collective Bargaining; Or
>
> B. Arbitrarily Set Union Dues Less A Union-Determined Rebate Amount?

The clear implication to be drawn from this question is that the Court of Appeals based its affirmance of the representation fees awarded by the trial court on a "dues-less-rebate" approach. This is not in fact so. Consistent with the decisions of this Court and the courts of Indiana, the Court of Appeals expressly relied upon prior decisions that had required "NPCTA, ISTA, and NEA [to] prove the proportion of their total expenditures which were chargeable to objecting employees." *Stewart, supra*, 487 N.E.2d at 1329. *See Abels, supra*, 489 N.E.2d at 539 ("the exclusive representative bears the burden of establishing, by a preponderance of the evidence, what proportion of their expenditures were properly assessable against non-members").

This Court's decisions establish that it is constitutional to require bargaining unit employees, over their objection, to support union activities that are related to collective bargaining. *See, e.g., Chicago Teachers Union v. Hudson*, 475 U.S. ——, 106 S. Ct. 1066, 1069 (1986); *Ellis v. Railway Clerks*, 466 U.S. 435, 455-56 (1984); *Abood v. Detroit Board of Education*, 431 U.S. 209, 217-32 (1977). It is equally well-established that, once a representation fee is challenged by a nonmember employee, the union has the burden of proving the appropriate fee amount: " 'Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, basic considerations of fairness compel that they, not the individual employees, bear the burden of proving such proportion.' " *Abood, supra*, 431 U.S. at 239-40 n.40 (quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963)), *quoted in Hudson, supra*, 106 S. Ct. at 1075.

In *Hudson, supra*, this Court provided further guidance with regard to the nature of this burden. The Court in *Hudson* stated that a union could not simply "identif[y] the amount that it admittedly had expended for purposes that did not benefit dissenting nonmembers," and then

charge nonmembers a fee based upon the remaining percentage of total expenditures. 106 S. Ct. at 1076. Rather, a union that seeks to collect representation fees from nonmembers has the burden of "identifying the expenditures for collective bargaining and contract administration that had been provided for the benefit of nonmembers as well as members—and for which nonmembers as well as members can fairly be charged a fee." *Id.*[7]

Despite petitioners' protestations to the contrary, *see* Petition at 13-14, this is precisely the burden of proof that NPCTA was required to, and did in fact, meet in this case. As described more fully in the Statement of the Case, *supra* at 6-11, the Court of Appeals expressly incorporated its prior decisions in *Stewart* and *Abels*, App. 2a, which held that NPCTA and its affiliated organizations "must prove the proportion of their total expenditures which were chargeable to objecting employees," 487 N.E.2d at 1329; *see* 489 N.E.2d at 539 ("the exclusive representative bears the burden of establishing, by a preponderance of the evidence, what proportion of their expenditures were properly assessable

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[7] For purposes of argument, we assume in this brief that this requirement applies to the collection of representation fees by exclusive representatives in Indiana, and demonstrate that NPCTA in fact complied with this requirement. It is important to note, however, that the Court in *Hudson* was dealing with the totally different situation in which a union seeks to collect and expend representation fees *before* an impartial determination has been made as to the allowable amount of the fee. In such circumstances, the Court indicated that "[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake, . . . dictate that the potential objectors be given sufficient information to guage the propriety of the union's fee." 106 S. Ct. at 1076. This rationale is not applicable in Indiana: there is no risk to a nonmember employee's First Amendment rights, inasmuch as state law prohibits the involuntary collection of representation fees from public school teachers, by payroll deduction or otherwise, unless and until there has been a final court judgment against the teachers awarding a specified representation fee to their exclusive representative.

against non-members"). And it was based on this standard that the court concluded that there was sufficient evidence in the record to support the trial court's judgment that NPCTA was entitled to representation fees from the petitioners. Moreover, this was not a new approach for the Indiana courts, for in the leading case upholding the imposition of representation fees under Indiana law, the Court of Appeals previously had concluded that "the burden [is] upon the Association to show non-political use of the funds." *Goetz*, *supra*, 443 N.E.2d at 373. In short, the holding of the Court of Appeals is fully consistent with this Court's agency fee decisions, including its decision in *Hudson*.

Petitioners' assertion that the Court of Appeals based the representation fee on "Union Dues Less A Union-Determined Rebate Amount," Petition at i, rather than on proof of NPCTA's chargeable expenditures, reflects a total misunderstanding of the role that membership dues played in the court's calculation of the fee. The dues were not used by the court to alter in any way the requirement that "NPCTA, ISTA, and NEA must prove the proportion of their total expenditures which were chargeable to objecting employees." App. 2a; 487 N.E.2d at 1329. It was only *after* that requirement had been satisfied that dues were used as a benchmark against which to calculate the allowable representation fees. Simply stated, once sufficient evidence had been introduced to establish the percentage of the total expenditures of NPCTA, ISTA, and NEA that "were 'necessarily or reasonably incurred for the purpose of performing [NPCTA's] duties [as] an exclusive representative.'" 487 N.E.2d at 1330 (quoting *Ellis*, *supra*, 466 U.S. at 448), the court applied that percentage to the dues charged to NPCTA members to determine the amount of the representation fees.[8]

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[8] A similar approach was approved in the decision of the Massachusetts Labor Relations Commission in *Dailey v. Woburn Teachers*

This use of dues as the final step in the representation fee calculation process finds ample support in the decisions of this Court, *see, e.g., Abood, supra*, 431 U.S. at 238 (citing *Machinists v. Street*, 367 U.S. 740, 774-75 (1961), for remedy of "restitution of a fraction of union dues paid equal to the fraction of total union expenditures that were made for political purposes"), and is in accord with the approach taken in various statutes authorizing the collection of representation fees, *see e.g.*, 45 U.S.C. § 152, Eleventh (Railway Labor Act provision linking involuntary membership fees to dues); Mich. Comp. Laws § 423.210(1)(c) (providing that representation fees for Michigan public employees may be "equivalent to the amount of dues uniformly required of members"); N.J.S.A. 34:13A-5.5(b) (providing that representation fees for New Jersey public employees may not "exceed 85% of the regular membership dues").

Petitioners contend that *Hudson* supports their position, but they are mistaken. There is nothing in that decision that disallows a cross-reference to dues for purposes of calculation *after* a union has, as NPCTA did

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Association, 13 MLC 1555 (No. MUPL-2850 Apr. 3, 1987), which is cited and quoted at length in the Petition at 14-16. In that decision, the state commission concluded that an exclusive representative could not simply subtract a "rebatable amount" of nonchargeable expenditures from the total dues charged to members. Rather, the commission held that an exclusive representative could follow one of two alternative means of establishing the amount of its representation fee, the second of which would allow the exclusive representative to prove the amount of its chargeable expenditures and then apply that percentage to the dues charged to members. *See* 13 MLC at 1564 (allowing an exclusive representative to prove its representation fees by proving the "particular proportion of [union] expenses [that] were permissible," and then combining that percentage with evidence of membership dues for that year). This is similar, if not identical to, the approach followed by the trial court in the instant case. Thus, notwithstanding petitioners' assertions to the contrary, the decision in this case is fully consistent with the decision of the Massachusetts Labor Relations Commission in *Dailey*.

here, proven the percentage of its total expenditures that is chargeable to nonmembers. Although a union's total expenditures may not in each and every year be precisely the same as its total dues income, the Court in *Hudson* obviously intended to allow for this type of minimal discrepancy when it reaffirmed that " '[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required.' " 106 S. Ct. at 1076 n.18 (quoting *Allen, supra*, 373 U.S. at 122, and *Abood, supra*, 431 U.S. at 239-40 n.40). Indeed, both the Court of Appeals and the Supreme Court of Indiana specifically considered the propriety of NPCTA's representation fees in light of *Hudson*, and summarily denied petitioners' claims. *See* App. 2a, 9a, 10a.[9]

In short, the first Question Presented in the Petition for Certiorari is based on a mischaracterization of the decision of the Court of Appeals of Indiana, and therefore cannot properly provide the basis for review by this Court.

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[9] Petitioners also seek to demonstrate that the representation fees were excessive by comparing total expenditurs by NPCTA, ISTA, and NEA for the relevant school years with the total "number of people represented and the number of people required to pay the costs of such representation." *See* Petition at 5-6. Even assuming, *arguendo*, that petitioners correctly state the dollars expended and employees represented in any given year, the resulting variations in representation fees may be explained by the annual fluctuations that are inherent in any union's membership and budgetary processes. Despite these fluctuations, unions almost invariably choose to assess a flat rate of dues on their members, rather than constantly changing their dues structure to account for annual variations in membership or in expenditures. The same administrative latitude surely must be available for representation fees. *Cf. Hudson, supra*, 106 S. Ct. at 1076 n.18 ("the Union cannot be faulted for calculating its fee on the basis of its expenses during the preceding year").

No. 87-854 (3)

Supreme Court, U.S.
FILED
APR 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

JERRY COLANESE, *et al.*,

Petitioners,

v.

NEW PRAIRIE CLASSROOM TEACHERS ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA

PETITIONERS' REPLY BRIEF

DAVID T. BRYANT
Counsel of Record
National Right to Work Legal Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510
Attorney for Petitioners

Of Counsel:

REX H. REED
National Right to Work Legal Defense Foundation, Inc.

ARTHUR L. ROULE, JR.
RAELSON, OSBORN, ROULE, BAUGHER & HEDGE
500 First National Bank Building
801 Lincoln Way, Suite 500
P. O. Box 1161
La Porte, Indiana 46350
(219) 362-3181

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No. 87-854

IN THE
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JERRY COLANESE, *et al.*,

Petitioners,

v.

NEW PRAIRIE CLASSROOM TEACHERS ASSOCIATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF INDIANA

PETITIONERS' REPLY BRIEF

I. DENIAL OF CERTIORARI BY THIS COURT HAS NO PRECEDENTIAL VALUE.

Initially, the Respondent argues that the Petition should be denied because petitions in similar cases were denied during the 1986 term of this Court. *See Abels v. Monroe County Education Association*, ____ U.S. ____, 107 S. Ct. 1347 (1987); *Stewart v. New Prairie Classroom Teachers Association*, ____ U.S. ____, 107 S. Ct. 1370 (1987).

Such denials have no value as precedent. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973); *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (Frankfurter, J.). And, in particular, a

denial of certiorari does not mean that the prior case was correctly decided.

> Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review.

Id.

II. THE METHOD OF CALCULATION APPROVED BY THE INDIANA COURT OF APPEALS CANNOT SURVIVE UNDER PROPER FIRST AMENDMENT ANALYSIS.

A. *The Decision Below*

Secondly, the Respondent argues that the Petitioners' claims are based upon a mischaracterization of the opinion of the Court of Appeals. However, it is the Respondent that has mischaracterized the decision below.

In deciding this case the Indiana Court of Appeals made no new independent analysis of the issues. Instead, it blindly relied on its prior, erroneous decisions in *Abels v. Monroe County Educ. Ass'n*, 489 N.E.2d 533 (Ind. Ct. App. 1986), *reh'g denied*, 490 N.E.2d 775, *cert. denied*, _____ U.S. _____, 107 S. Ct. 1347 (1987), and *New Prairie Classroom Teachers Ass'n v. Stewart*, 487 N.E.2d 1324 (Ind. Ct. App. 1986), *cert. denied*, _____ U.S. _____, 107 S. Ct. 1370 (1987). *See* Appendix, p. 2a. That those cases involve a dues-less-rebate calculation is shown by the following quotation from *Abels*, 489 N.E.2d at 539:

> Appellants proposed method of calculating the fair share representation fee results from a far too narrow reading of the test announced in *Ellis*. That test is useful only in determining what expenses are properly assessable against non-members. The appropriate formulation is the one suggested by earlier Supreme Court decisions and applied by the trial court below. That method defines a fair share representation fee as dues less a pro rata share of non-assessable expenses. (Citations omitted.)

The cases of this Court referred to by the Court of Appeals are *Railway Clerks v. Allen*, 373 U.S. 113 (1963), and *Machinists v. Street*, 367 U.S. 740 (1961). In those cases this Court did not utilize a "least restrictive means" analysis and, as shown below, the First Amendment requires utilization of that test. *Allen* and *Street* are inapposite to the issues raised here.

B. *Petitioners Contest The Failure Of The Court Of Appeals To Require Proof Of The Cost Of Providing Services To Their Bargaining Unit.*

Thirdly, the Respondent argues that the second question really involves a mere disagreement with the factual conclusions reached by the court below and that in raising it the Petitioners disregard the record in the case. Apparently, the Respondent does not perceive the issue.

Petitioners contend that before fees for affiliated organizations may be awarded, it must be shown that the expenses were incurred on behalf of Petitioners' bargaining unit. The record below is clear that no proof was offered as to how much money either ISTA or NEA spent in providing services to the exclusive representative in this case. Petitioners argue, then, as a matter of law,

that that failure is fatal to the claim for fees for the affiliated organizations. This Court has indicated that such proof is required. *Ellis v. Railway Clerks*, 466 U.S. 435, 448, 453 (1984); *and see* Petition at pp. 16-23. The absence of proof of the costs entailed in providing collective bargaining services to the unit to which the Petitioners belong is fatal to the claim for fees for ISTA and NEA.

C. *The "Least Restrictive Means" Test Is The Required Form Of Analysis In This Case.*

At pages 14-17 of the Opposition, and particularly in the footnotes on those pages, the Respondent argues that the rationale of this Court's decision in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), is not applicable in Indiana because unions must bring suit in order to coerce payment of the fees. This Court's decisions in *Tierney v. City of Toledo*, ____ U.S. ____, 106 S. Ct. 1628 (1987), and *Abernathy v. San Jose Teachers Ass'n*, 475 U.S. 1063 (1986), clearly show that *Hudson* procedures are required in Indiana. This conclusion is buttressed by the Sixth Circuit's decision after remand in *Tierney v. City of Toledo*, 824 F.2d 1497 (1987) (*Hudson* procedures must be provided before money may be collected), and *Ellis v. Western Airlines*, 652 F. Supp. 938 (S.D. Cal. 1986) (nonpayer may not be discharged in the absence of a valid *Hudson* procedure).

Implicit in the Respondent's arguments is the notion that the First Amendment permits the more onerous of two feasible alternatives to be required. In effect the argument admits that many of the people ISTA and NEA are required to represent do not have an obligation to pay and that these Petitioners must, therefore, be required to pay a portion of what it costs to represent

those other "free riders." But that result is precisely why the method previously approved by the Indiana Court of Appeals cannot survive proper First Amendment scrutiny.

In *Hudson* this Court makes it clear that it is First Amendment rights that are touched by agency fees.

> First, although the government interest in labor peace is strong enough to support an "agency shop" notwithstanding its limited infringement on nonunion employees' constitutional rights, the fact that those rights are protected by the First Amendment requires that the procedure be carefully tailored to minimize the infringement.

Hudson, 475 U.S. at 303. Note 11 to the above text states:

> See *Roberts v. United States Jaycees*, *supra* [468 U.S. 609], at 623 (Infringements on freedom of association "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms"), *Elrod v. Burns*, 427 U.S. 347 (1976) (government means must be "least restrictive of freedom of belief and association"); *Kasper v. Pontikes*, 414 U.S. 51, 58-59 (1973) ("[E]ven when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty"); *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Precision of regulation must be the touchstone" in the First Amendment context).

It is these precedents that should have guided the Indiana Court's decision and not *Street* and *Allen* which were relied on by the Indiana Court of Appeals in *Stewart* and

Abels. No issue was raised in *Street*, *Allen* or *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977), concerning the proper way to calculate a pro rata share. The issue is raised here, and *Hudson* makes it clear that the procedure, including the method of calculation, must be "carefully tailored to minimize the infringement." *Id.*, 475 U.S. at 303.

Public sector agency shops are justified by the desire for labor peace and the elimination of the "free rider". *Abood*, 431 U.S. at 224, 97 S. Ct. at 1794. Both of those goals are satisfied if a nonmember is required to pay a pro rata share of what it costs the union to provide the individual with services. In *Daily v. Woburn Teachers Association*, 13 MLC 1555 (1987), the Massachusetts Labor Relations Commission, an expert administrative agency with expertise in this area, identified two methods that a union could use to calculate a service fee for nonmembers. One of those is the method approved by the Indiana Court of Appeals in *Stewart* and *Abels* and the other is the method urged here by the Petitioners. Either one is a feasible way of making the calculation; but where, as here, use of one method produces a significantly greater injury to the First Amendment interests of the individual, *Hudson* and the other First Amendment cases cited, *supra* at 5, require that the other method be used because that is the method that ". . . is carefully tailored to minimize the injury." *Hudson*, 475 U.S. at 303.

The Indiana Court of Appeals did not apply a "least restrictive means" analysis in *Stewart*, *Abels*, or this case. However, *Hudson* requires the use of that test. The first question presented asks whether the First Amendment permits a dues-less-rebate calculation or whether an

agency fee must be based on a pro rata share of the proven costs of collective bargaining.

The record below clearly shows that a pro rata share is much less than the dues-less-rebate figure approved by the Indiana Court of Appeals. Thus, the First Amendment violation which is caused by the decision below is apparent.

The simple question—how do you calculate an agency fee—is fundamental, and the answer affects every agency fee payer in the country in both the public and the private sectors. The court below misinterpreted this Court's agency fee decisions in *Hudson*, *Ellis*, *Abood*, *Allen*, and *Street* and reached the wrong answer. The need for further guidance from this Court in this sensitive area impacting on First Amendment interests is clear. The petition should be granted in order to provide the lower courts with guidance that is obviously necessary.

CONCLUSION

For the foregoing reasons and for the reasons stated in the petition the Court should grant the petition and set the case down for plenary briefing and argument.

Dated April 5, 1988

Respectfully submitted,

DAVID T. BRYANT
Counsel of Record
National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, Virginia 22160
(703) 321-8510

Attorney for Petitioners

Of Counsel:

REX H. REED
National Right to Work Legal
Defense Foundation, Inc.

ARTHUR L. ROULE, JR.
RAELSON, OSBORN, ROULE,
BAUGHER & HEDGE
500 First National Bank Building
801 Lincoln Way, Suite 500
P.O. Box 1161
La Porte, Indiana 46350
(219) 362-3181